118-152

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 221.

NICHOLAS E. PAINE, PLAINTIFF IN ERROR,

vs.

THE CENTRAL VERMONT RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

FILED APRIL 27, 1883.

have been employed in these cases, may be appealed to as evidence of what the law has been considered to be on the point in question. "Littleton having mentioned a matter, which 'is proved by pleading,' Sir Edward Coke's comment on this is,—'Note, one of the best arguments or proofs in law is drawn from right entries or course of pleading; for the law speaketh by good pleading, and therefore Littleton here saith, it is proved by the pleading, &c., as if pleading were *ipsius legis viva vox*.'"

Ram on Legal Judgment, 41.

Thos. F. Davidson
Of Counsel for Defts. in Error.

John C. Black &
Thos. F. Davidson
Attys for Defts in Error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Vermont, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court before you, between Nicholas E. Paine and the Central Vermont Railroad Company, a manifest error hath happened to him, the said Nicholas E. Paine, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the District of Columbia, on the second Monday of October, A. D. 1883, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected,
2 the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 28th day of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

[Seal Circuit Court, Vermont District, U. S. A.]

B. B. SMALLEY,
Clerk of the Circuit Court of the United States for the District of Vermont.

2½ [Endorsed:] Writ of error. Nicholas E. Paine, plaintiff in error, *vs.* The Central Vermont R. R. Co., defendant in error. Supreme Court of the U. S. October term, 1883. H. S. Royce, Hard & Safford, attorneys. Filed February 28, 1883. Geo. E. Johnson, deputy clerk.

3 UNITED STATES OF AMERICA, *District of Vermont,* } *ss:*

I, Bradley B. Smalley, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 42 inclusive, contains a true and complete transcript of the records and proceedings had in said court, in the case [of] Nicholas E. Paine, plaintiff in error, against the Central Vermont Railroad Company, defendant in error, as the same remains of record and on file in said cause.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Burlington, in said Vermont district,

in the second circuit, this 11th day of April, A. D. 1883, and of the Independence of the United States the one hundred and seventh.

[Seal Circuit Court, Vermont District, U. S. A.]

B. B. SMALLEY, *Clerk.*

4 United States Circuit Court, District of Vermont.

NICHOLAS E. PAINE
vs.
THE CENTRAL VERMONT RAILROAD COMPANY.

Be it remembered that at a term of the circuit court of the United States begun and holden at Rutland, in and for the Vermont district, in the second circuit, on the first day of October, A. D. 1878, comes Nicholas E. Paine and files his writ against the Central Vermont Railroad Company; which said writ and the officer's return thereon is in the words and figures following:

UNITED STATES, *Vermont District,* } *To wit:*

The President of the United States to the marshal of the Vermont district, or either of his deputies, Greeting:

By the authority of the United States, you are hereby commanded to attach the goods, chattels, or estate of the Central Vermont Railroad Company, a corporation duly and legally chartered by
5 the Legislature of the State of Vermont, and legally organized and operating the Central Vermont and Vermont & Canada railroads, and having its principal office at St. Albans, in said district, to the value of ten thousand dollars, and them notify thereof; and also notify them to appear before the circuit court of the second circuit of the United States, next to be holden at Rutland, within and for said district, on the first Tuesday of October next, then and there to answer unto Nicholas E. Paine, of the city, county, and State of New York, in a plea of the case, for that the said defendants heretofore, to wit, on the 10th day of July, A. D. 1873, at Boston, in the Commonwealth of Massachusetts, to wit, at St. Albans aforesaid, by one H. B. Wilbur, the treasurer of said company, for value received, made and executed their certain promissory note in writing, and thereby then and there promised to pay to the order of said H. B. Wilbur, as such treasurer as aforesaid, the the sum of five thousand dollars on demand, with interest thereon, which said promissory note was then and there signed by said
6 Wilbur as such treasurer as aforesaid, he, the said Wilbur, being duly authorized to make and sign said note for and on behalf of said defendants.

And the said Wilbur afterwards, to wit, on the day and year last aforesaid, at Boston aforesaid, to wit, at St. Albans aforesaid, in consideration of the sum of five thousand dollars then and there received by the said defendants of the plaintiff, by his endorsement in writing, ordered the contents of said note to be paid to the plaintiff, and then and there delivered said note to the plaintiff, whereby

the said defendants became liable to pay to the plaintiff, the said sum of money in the said promissory note specified, and in consideration thereof then and there promised to pay the same to the plaintiff on demand; yet the said defendants, not regarding their said promise, have not paid the same, though often requested.

Also, in a further plea of the case, for that the said defendants, as receivers and managers of the Vermont Central and Vermont and Canada railroads, heretofore, to wit, on the 10th day of July, A. D. 1873, at Boston, in the Commonwealth of Massachusetts, to
7 wit, at St. Albans aforesaid, by one H. B. Wilbur, the treasurer of said Central Vermont Railroad Company, for value received, made and executed their certain other promissory note, in writing, as such receivers and managers, and thereby then and there, as such receivers and managers, promised to pay to the order of said Wilbur, as such treasurer, the sum of five thousand dollars on demand, with interest thereon, which said promissory note was then and there signed by said Wilbur, as such treasurer, as aforesaid, he, the said Wilbur, being duly authorized to make and sign said note for and on behalf of said defendants.

And the said Wilbur afterwards, to wit, on the day and year last aforesaid, at Boston aforesaid, to wit, at St. Albans aforesaid, in consideration of the sum of five thousand dollars received by the said defendants, as such receivers and managers, of the plaintiff, by his endorsement in writing, ordered the contents thereof to be paid to the plaintiff, and then and there delivered said note to the plaintiff, whereby the said defendants, as such receivers and managers, became liable to pay to the plaintiff the said sum of money in
8 the said promissory note specified, and in consideration thereof then and there, as such receivers and managers, promised the plaintiff to pay him said sum on demand; yet the said defendants, not regarding their said promise and undertaking, have not paid the same, though often requested.

Also, in a plea of the case, for that the defendant, at St. Albans aforesaid, on the first day of July, A. D. 1877, were indebted to the plaintiff in the sum of eight thousand dollars for so much money before that time had and received by the defendants to the plaintiff's use; and in the like sum for so much money before that time lent and accommodated by the plaintiff to the defendants, at their request; and in like sum before that time paid, laid out, and expended by the plaintiff for the use of the defendants, and at their request; and in the like sum for certain work, labor, care, and diligence of the plaintiff before that time done and performed and bestowed about the business of the defendants and for the defendants, at their request, and for divers materials in and about said work furnished by the plaintiff at the defendants' request; and
9 also in the like sum for divers goods, wares, and merchandise of the plaintiff before that time sold and delivered and bargained and sold to the defendants, at their request; and also in the like sum for so much money found due from the defendants to the plaintiff on accounting between them; and in consideration thereof the defendants then and there promised the plaintiff to pay him the

said sum on demand; yet, though often requested, the defendants have not paid the same, but neglect and refuse so to do, to the damage of the said plaintiff the sum of ten thousand dollars, to recover which, with just costs, the plaintiff brings suit.

And have you then there this writ, with your doings herein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Washington, this 15th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

[L. S.] GEO. E. JOHNSON,
Deputy Clerk.

10 UNITED STATES OF AMERICA, *District of Vermont*, } *ss:*

At Northfield, in said district, on the 26th day of July, A. D. 1878, by virtue of this writ and by the direction of H. S. Royce, Esq., attorney for the within-named plaintiff, I attached, as the property of the within-named defendant, "The Central Vermont Railroad Company," five hundred shares of the capital stock of said corporation, by delivering to George Nichols, clerk of said corporation, for said corporation, a true and attested copy of this writ, with a list of the property so attached, with this my return thereon endorsed.

Attest: GEO. P. FOSTER,
U. S. Marshal.

117 miles' travel	7 02
Service	2 00
Copy	2 00
	$11 02

[Endorsed:] Writ. Nicholas E. Paine *vs.* The Cen. Vt. Railroad Co. U. S. C. Court, Dist. Vt. Oct. term, A. D. 1878. H. S. Royce, att'y. Returned served October 1st, 1878. Geo. E. Johnson, deputy clerk.

11 And thereupon it was ordered that said cause be entered on the docket of this court, and it was so entered.

And afterwards, and at said October term, A. D. 1878, said cause was continued to the February term, A. D. 1879, of this court.

And afterwards, and at said February term, said cause was continued to the May term, A. D. 1879, of this court.

And afterwards, and at said May term, said cause was continued to the October term, A. D. 1879, of this court, and was continued from term to term thereafter until the May term, A. D. 1882, of this court.

And afterwards, and on the 28th day of August, A. D. 1879, the defendant filed its pleas in said cause, which said pleas are in the words and figures following:

12 U. S. C. Court, District of Vt., May Term.

NICHOLAS E. PAINE *vs.* THE CENTRAL VT. R. R. CO.

And now the said Central Vermont Railroad Company comes and defends, &c., when, &c., and says that the said Central Vermont Railroad Company did not assume and promise in manner and form as the said plaintiff in his said declaration hath alleged, and therefore prays that the same may be inquired of by the country.

By NOBLE & SMITH,
Def't's Att'ys.

And now the said defendant, for further plea to the several counts in the plaintiff's said declaration, by leave of court for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have and maintain his aforesaid action thereof against the said defendant, because the supposed promissory note set forth in the first count of the plaintiff's declaration is the same promissory
13 note set forth in the second count of the said declaration, and is the only cause of action upon which all the counts in said declaration are predicated; that though true it is that said supposed promissory note was executed in manner and form as set forth in said declaration, the same was not delivered to the plaintiff, as therein stated, but was, subsequently to its execution, and upon the day of its date, to wit, on the 10th day of July, A. D. 1873, at said St. Albans, for value received, delivered by said defendant to John Q. Hoyt and —— McKinney, then partners in business, in the firm name of Hoyt & McKinney, who thereby became the legal owners and holders of said note; that subsequently to the delivery of said note to the said Hoyt and McKinney, and while they were the owners and holders thereof, and before the plaintiff received said note, the said Central Vermont Railroad Company fully paid said note to the said Hoyt and McKinney, to wit, at St. Albans aforesaid, on the — day of ——, A. D. 1873, and that the said plaintiff, at the time he received
14 said note, to wit, at St. Albans aforesaid, on the day and year last aforesaid, had full notice of said payment of said note by the said defendant, all which the said defendant is ready to verify. Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant and for the defendant's costs.

By NOBLE & SMITH,
Def't's Att'ys.

And now the said defendant, according to the statute in such case made and provided, gives notice to the plaintiff in this case that upon the trial of the same the said defendant will give in evidence under the general issue, and rely upon the following special matter, to wit:

That the defendant, as a corporation, was organized on the — day of May, 1873; that the firm of Hoyt & McKinney, of New York city, were original subscribers to the stock of defendant corporation,

and on the said 10th day of July, A. D. 1873, were then stock-
15 holders in said corporation to the amount of five hundred shares, of the par value of one hundred dollars each, the stock being only partially paid for; that on said last-named date the defendant, being in urgent need of some money and not having time to regularly lay and collect an assessment on its capital stock, the said Hoyt & McKinney advanced the defendant five thousand dollars, and the defendant gave them therefor the note described in said declaration, under an agreement that the said Hoyt & McKinney should hold the same until an assessment and call covering that amount should be made on the said stock standing in their names; and it was understood and agreed by and between said Hoyt & McKinney and the defendant that when such assessment or call should be thereafter made the said five thousand dollars so advanced as aforesaid should be applied in payment thereof, and that said promissory note should be thereby paid and extinguished, and should be surrendered up; and thereafter, to wit, on the 10th day of August, A. D. 1873, an assessment and call covering said five thousand
16 dollars was made by the defendant upon its capital stock, including the stock of said Hoyt & McKinney, and the said five thousand dollars so advanced as aforesaid was thereafter, to wit, on the 28th day of October, A. D. 1879, duly applied in payment of said assessment and call, whereby the said note was paid and extinguished; that said note was suffered to remain in the hands of said Hoyt & McKinney through inadvertence; that said plaintiff received said note of John Q. Hoyt, one of the members of the firm of Hoyt & McKinney, long after its execution, and long after its payment and extinguishment, as heretofore stated, as security for a pre-existing debt from the said Hoyt to the said plaintiff, or the said Hoyt & McKinney to said plaintiff, and with full knowledge of the said satisfaction and payment, as hereinbefore set forth, to wit, at New York city, to wit, at St. Albans, Vt., and long after said note ceased to be current.

By NOBLE & SMITH, *Att'ys.*

17 And afterwards, and on the 16th day of May, A. D. 1882, a stipulation was filed referring said cause to the Honorable Hoyt H. Wheeler to try and decide the case as referee, which said stipulation is in the words and figures following:

United States Circuit Court, Dist. of Vermont. May Term, 1882.

NICHOLAS E. PAINE

vs.

THE CENTRAL VERMONT RAILROAD COMPANY.

In this case it is stipulated and agreed to refer this case to Hon. Hoyt H. Wheeler to try and decide the case as referee, the case to

be tried at Burlington, in said district, on the rule day of such court in July next.

H. S. ROYCE,
Att'y for Pl'f.
DAN'L ROBERTS,
For Def't.

And afterwards, and on the 6th day of September, A. D. 1882, said referee filed his report in said cause, which said report is in the words and figures following:

18 Circuit Court of the United States, District of Vermont. May Term, 1882.

NICHOLAS E. PAINE
vs.
CENTRAL VERMONT RAILROAD COMPANY.

Having heard the above-entitled cause, pursuant to the reference thereof, I respectfully report:

On the hearing it appeared from the evidence that in 1872 several persons were in possession of and operating the Vermont Central and Vermont & Canada railroads as receivers and managers of the court of chancery of the State, in Franklin county, and had prepared to issue a series of long-time bonds, called income and extension bonds, a part of which had not been negotiated. The defendant was chartered with power to temporarily operate those roads, subject to the order of that court, and to assume the contracts of the receivers and managers. Subscriptions to the capital stock of the defendant were opened, and two millions in amount subscribed for April 30, 1873, of which John Q. Hoyt, of the city of New
19 York, subscribed for fifty thousand dollars, and it was expected by the subscribers that when the company should be organized it would be appointed receiver of those roads and assume the obligations of the other receivers. Five per cent. of the subscriptions was required by the commissioners of subscription to be paid down. The receivers were in need of funds, and by arrangement with them one of the subscribers advanced two hundred thousand dollars, ten per cent. of the subscriptions, in behalf of all the subscribers, as a temporary loan to the receivers pending the organization of the company and proceedings to carry out the expectations of the subscribers, and a note of that amount was made, and, with four hundred thousand dollars in amount of the income and extension bonds as collateral security for its payment, delivered to the subscriber making the advance, upon the understanding that the note should be paid if the defendant company did not come into possession of the roads and assume the obligations of the receivers, and stand against the subscriptions for stock if it did.

The defendant company was organized May 27th, 1873; was appointed receiver and manager of the roads June 21st, 1873,

20 and went into possession of the roads, assuming the obligations of the former receivers and managers July 1st, 1873. An assessment of thirty per cent. on the subscriptions for stock was laid June 24th, another of ten per cent. August 13th, and another of ten per cent. October 28th, 1873, the last payable on or before December 1st, 1873. The assessment of June 24th was paid by the subscribers, respectively, including Hoyt. After the arrangement for making the defendant receiver of the roads was consummated, the note of two hundred thousand dollars was given up, and new notes of the defendant were given, running to the subscribers separately, each in proportion to the amount of the subscription. The other subscribers paid to the one who made the advance each his proportion of it, and received the notes and a proportionate amount of the collateral bonds. Hoyt paid five thousand dollars, and received the note in suit and ten thousand dollars of the bonds. Hoyt paid the assessment of August 13th and one-half the assessment of October 28th; the other half of the latter was rescinded, and stock issued for one-half the amount subscribed. The assessments
21 paid amounted to fifty per cent. of the subscription. Hoyt paid, as stated, fifty per cent., and no more, of his subscription. There was no other consideration for this note, and by the understanding of the parties it was to be delivered up with the collateral bonds on delivery to him of stock certificates for his stock.

About November 1st, 1873, Hoyt became indebted to the plaintiff, at New York, for seven thousand dollars lent, with the understanding that the loan should be increased to ten thousand dollars, and delivered this note and these bonds to him as security for the payment of the loan. The plaintiff at that time knew from previous conversations with Hoyt generally about the subscription for stock and the situation and circumstances of the roads, but he did not know before and was not then informed that the note was to stand against the subscription for the stock, nor that the bonds, which then had a long time to run, were collateral to the note, but took all of them supposing that they were valid securities for what they purported to be. The loan was increased to eight thousand five hundred dollars December 14th, 1873, and to ten thousand dollars on the 12th day of February, 1874.

22 On the first day of December, 1873, Hoyt paid to the plaintiff four hundred eighty-three dollars and seventy-five cents; on the first day of January, 1874, six hundred fifty-eight dollars and seventy-five cents; on the 12th day of February, 1874, six hundred fifty-eight dollars and seventy-five cents; on the first day of March, 1874, five hundred dollars; on the first day of April, 1874, five hundred dollars; on the 7th day of May, 1874, five hundred dollars; on the first day of June, 1874, five hundred dollars: on the first day of July, 1874, five hundred dollars; on the first day August, 1874, five hundred dollars; on the first day of September, 1874, five hundred dollars; on the first day of October, 1874, five hundred dollars; and on the first day of November, 1874, five hundred dollars. Hoyt understood when he made these payments that the several sums were paid from month to month for the use of the

money during each preceding month, and for nothing else, and was willing to pay these amounts for that accommodation, and has never claimed that the money should be applied otherwise. The plaintiff knew that the lawful rate of interest in New York, where
23 this transaction was had, was seven per cent.; that the taking of a greater rate would be contrary to law, and, if insisted upon, avoid the debt, and in receiving these sums intended that the lawful rate only should be considered as interest, and that the excess should be understood as compensation for services and accommodations, for which no charge was ever otherwise made, and on which nothing is now shown to have been legally due. November 1st, 1874, a new demand note of ten thousand dollars was given by Hoyt to the plaintiff on account of the loan, which both understood to be the amount due.

Certificates of stock were issued for all the subscribers in 1874, and delivered to them, and all but Hoyt delivered up the notes and bonds. When his was offered to him he said he had not the note and bonds at hand, but did not state where they were, or that they were not under his control, and that he would procure them soon and deliver them up, and suggested that the stock be retained until he should do so; but it was delivered to him without waiting for that to be done, and put in a safe belonging to him and his
24 partner. His partner found them there and pledged them, without his knowledge. He endeavored to procure the note and bonds of the plaintiff to deliver up to the defendant, but was unable to do so. On the 6th day of April, 1876, he paid the plaintiff five hundred dollars on the note of ten thousand dollars, and has made no further payments.

Soon after that payment the plaintiff called on the president of the defendant for payment of the note in suit, who told him the circumstances under which the note was given, but did not state that they would be relied on as a defence to the note, or that any question would be made about its validity, and requested him to wait and endeavor to get payment from Hoyt, and encouraged him that he would succeed in doing so. He had a similar interview with a like result afterwards, the president adding that if Hoyt did not pay the plaintiff's note the defendant would not ask him to wait again, but would provide for the payment of this one.

Just before this suit was brought a similar interview was had, during which the president told him that he thought and
25 had been advised that the circumstances under which the note was given would constitute a good defence to the note, and did not pay it.

The income and extension bonds were sold in the market March 24th, 1881, for five thousand dollars, less twelve dollars and fifty cents commission, without notice to Hoyt or the defendant. They had been worth more while the plaintiff held them, but this was their then market value.

The note is made a part of this report. It was executed as to time and place according to its purport. The paper now attached

to it was attached to it when it was delivered to the plaintiff. The proceedings by which the receivers prior to the defendant and the defendant became receivers, as shown in a book of charters, decrees, and leases, were put in evidence, and are made a part of this report. All the evidence showing the circumstances under which the note was given and the proceedings in relation to it were seasonably objected to and admitted against the objections.

The respective rights of the parties to recover in this action are, upon these facts, submitted to the court.

HOYT H. WHEELER, *Referee.*

Referee's fees, $75.00, paid by plaintiff.

26 $5,000. BOSTON, *July 10th*, 1873.

On demand, after date, with interest, we promise to pay to the order of H. B. Wilbur, treasurer, five thousand dollars.

CENTRAL VERMONT R. R. CO.,
As Receivers & Managers Vermont Central & Vermont & Canada R. R.,
By H. B. WILBUR, *Treasurer.*

No. 8. Value received. Approved:
J. GREGORY SMITH, *President.*
H. B. WILBUR, *Treas'r.*

Pursuant to the order of the honorable court of chancery within and for the State of Vermont, issued by Hon. Homer E. Royce, chancellor, on the 21st day of June, A. D. 1873, the possession and management of the Vermont Central and Vermont & Canada R. R'ds, including all leased roads and lines of transportation now under the management of J. Gregory Smith, Joseph Clark, Worthington C. Smith, B. P. Cheney, and Laurence Barnes, as receivers and managers, by virtue of former orders of the court of chancery, has been transferred to the "Central Vermont Railroad Company," as receivers & managers.

St. Albans, Vt., July 1st, 1873.

THE CENTRAL VERMONT R. R. CO.,
By J. GREGORY SMITH, *President.*

J. GREGORY SMITH,
JOSEPH CLARK,
WORTHINGTON C. SMITH,
B. P. CHENEY,
LAURENCE BARNES,
Receivers and Managers.

27 In accordance with the foregoing the Central Vermont Railroad Company hereby give notice that they have taken formal possession of the Vermont Central & Vermont & Canada railroads and the leased lines of railroads and lines of transportation, which are as follows:

The Ogdensburg and Lake Champlain railroad.
" Rutland railroad.
" Stanstead, Shefford & Chambly railroad.
" Missioquoi railroad.
" Addison railroad.
" Vermont Valley railroad.
" Vermont & Massachusetts railroad (between Brattleboro' and Grout's Corner).
" Northern Transportation Company of Ohio.

All accounts of the above-named roads and lines will be kept in the name of the said Central Vermont Railroad Company as receivers and managers aforesaid, and all returns will be made to them at their principal offices, in St. Albans, to the departments to which said returns properly belong, and all settlements will be made through those departments.

The Central Vermont Railroad Company also give notice
28 that by an arrangement concluded between the parties the leases of the New London Northern railroad and of the Sullivan railroad have been assigned and transferred to them, and that a contract for the lease of the Montreal & Vermont Junction railroad has also been made by this company, and that the possession and control of said last-mentioned roads has been assumed by this company.

All accounts on these roads will be kept in the name of the Central Vermont Railroad Company, and all returns will be made to them at their principal offices, in St. Albans, Vt., to the several departments to which said returns properly belong, and all settlements will be made through these departments. Blanks for reports and statements will be furnished from the general offices.

THE CENTRAL VERMONT
RAILROAD COMPANY,
By J. GREGORY SMITH, *President.*

And afterwards, and at said May term, said cause was continued to the October term, A. D. 1882, of this court.

29 And afterwards, and during said October term, A. D. 1882, said cause came on for trial, upon the report of the referee, before the Honorable Hoyt H. Wheeler, district judge of the United States within and for the district of Vermont, and, after hearing the arguments of counsel for the plaintiff and defendant, the court, on the 7th day of November, A. D. 1882, filed its decision in said cause, rendering judgment for the defendant, which said decision is in the words and figures following:

30 United States Circuit Court, District of Vermont. October Term, 1882.

NICHOLAS E. PAINE
vs.
CENTRAL VERMONT RAILROAD COMPANY.

WHEELER, J.:

The note on which this suit is brought was given for money lent,

was payable on demand with interest, and was to stand against assessments on the subscription of the person to whom it was originally made payable, to the defendant's capital stock. It came to the hands of the plaintiff between three and four months after it was made. Assessments on that subscription large enough to cover the note were made and stood against that person before the transfer of the note to the plaintiff. The balance of the assessments was paid by him, so that the amount due on the assessment exactly equaled the note at the time the plaintiff took it. The note was to be given up when the stock certificates should be delivered, but the note
31 was in the hands of the plaintiff, and the certificates were delivered to the subscriber on his assurance that he would procure the note and give it up.

The evidence by which these facts as to the assessments were proved was objected to, and it is argued that it was not admissible to affect the note, and that without it there would be no defence to the note.

There is no question but that parol evidence is inadmissible to alter, contradict, or vary a written instrument in an action upon the instrument, as claimed by the plaintiff, but that rule is not applicable to this proof. This evidence did not vary the note nor its obligation. It recognized the note as a valid instrument according to its terms, but showed an obligation from the holder to an equal amount to be set off against the note. There is no fair question but that the evidence is admissible if the facts established by it would affect the note in the hands of the plaintiff.

At the time the plaintiff took the note it had not been de-
32 manded, and if it had been it would not have been honored but by making the offset, according to the understanding. The plaintiff took it for value as security for a loan actually advanced. If he cannot recover upon it, he may lose some of the money lent; if he does recover upon it, the defendant may lose the assessment. The question arises here as to which, under the law, should stand this risk of loss. The plaintiff took the title of the person he dealt with to the note, and acquired all the rights of that person upon the note. Those rights were to have the note set off against the assessments. If the plaintiff's rights are no greater than that, he cannot recover. He has no greater rights unless the defendant is bound to stand to the note in the hands of the plaintiff, on account of his position in respect to it, as induced by the act of the defendant in leaving the note outstanding. If the act of the defendant in leaving it outstanding induced him to part with his money without fault, the defendant ought to make the note good to him as it appeared to be, but if he was in fault in taking it, he has no
33 ground to hold the defendant to make it good to him. As the note was on demand it was due presently. It would be, to be presented and paid according to the usual course of business, if free from defences. The time would come when, if outstanding, the presumption would be that it had been demanded, or that a demand had been omitted because known to be unavailing. If this time was such as to make it reasonable to suppose that the note was

outstanding, because it would not be paid, then the plaintiff was in fault in taking it without inquiring of the maker. Whether the lapse of time was such is a question of law. On this question the authorities are not uniform, but no case shows that more than three months can reasonably be overlooked. Business paper would usually be adjusted within that time, if regular. In this case the circumstance that the holder of the note was borrowing on disadvantageous terms would lead directly to the inquiry why he did not re-
34 sort to the maker of the note when it was due on demand. Had the plaintiff inquired, the presumption is that he would have learned the truth, and both have been saved from loss. As he did not inquire it seems more just, as well as lawful, that he should take the risk brought about by the failure to inquire than that the defendant should.

It has been argued with much plausibility that there was nothing perfected to meet the note until the stock certificates were delivered, long after the plaintiff had it, and that therefore it was valid when the plaintiff took it. But this argument is not well founded in fact. The person who took the note was not a purchaser of stock, but a subscriber for stock. The assessments made the debt due from him, and it was that debt which met the note. He could not resist payment of assessments because the stock certificates were not delivered. The delivery of the certificates did not pay the note nor create the debt which would pay it. That was merely the occasion when
35 the note was to be delivered up. American Bank *vs.* Jenniss, 2 Met., 288.

The president of the defendant held out encouragement to the plaintiff that the defendant would pay this note if the plaintiff did not succeed in collecting the debt to which it was collateral, and this fact has been relied upon by the plaintiff as a waiver of the defence now set up. There was no new consideration for any undertaking in this respect. It does not appear that the plaintiff lost anything by reason of what took place on this subject. He has the same right against his debtor since that he had before, and the same rights against the defendant.

The plaintiff must stand upon his rights acquired by taking the note at the time and under the circumstances when he took it. The note was at that time overdue, and he took it with the same obligation that it carried in the hands of the person whom he took it of.

This principle that over-due paper is taken subject to all
36 defences is so well settled in the law as to require no citation of authorities to support it.

Judgment for defendant.

For plaintiff, Heman S. Royce, Eleazer R. Hard.

For defendant, Daniel Roberts.

37 And afterwards, and on the same 7th day of November, A. D. 1882, the court ordered "judgment for defendant" to be entered on the docket of this court, and it was so entered.

And afterwards, and on the 11th day of November, A. D. 1882, an "order allowing plaintiff's exceptions" was filed, which said order is in the words and figures following:

Circuit Court of the United States, District of Vermont.

NICHOLAS E. PAINE,
vs.
CENTRAL VERMONT RAILROAD COMPANY, } October Term, 1882.

Upon the report of the referee the court rendered judgment for the defendant, to which decision and judgment the plaintiff excepted. Exceptions allowed and ordered to be placed on record.

HOYT H. WHEELER.

38 And afterwards, and on the 28th day of February, A. D. 1883, the plaintiff prayed out a writ of error to the Supreme Court of the United States, and the same was duly allowed and ordered to be filed, and was filed on said 28th day of February, A. D. 1883.

And on the same 28th day of February, A. D. 1883, the plaintiff filed a bond in error, and the same was duly approved by the court and ordered to be filed, and was filed, which said bond is in the words and figures following:

39 Circuit Court of the United States for the District of Vermont.

NICHOLAS E. PAINE
vs.
THE CENTRAL VERMONT RAILROAD COMPANY.

Know all men by these presents, That we, Nicholas E. Paine of Underhill, in the county of Westchester, and State of New York, as principal, and L. S. Drew, of Burlington, in the county of Chittenden, and State of Vermont, as surety, are held and firmly bound unto the Central Vermont Railroad Company, a corporation duly and legally chartered and organized, and doing business and having its principal office at St. Albans, in the State of Vermont, in the sum of two hundred dollars, to be paid to them and their successors and assigns. To which, payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Signed with our hands, and sealed with our seals, and dated this 28th day of February, A. D. 1883.

Whereas the above-named Nicholas E. Paine, hath pre-
40 sented a writ of error to the Supreme Court to reverse a judgment rendered in the above-entitled action by the circuit court of the United States for the district of Vermont.

Now therefore, the condition of this obligation is such that if the above-named Nicholas E. Paine shall prosecute his said writ of error to effect, and answer all costs, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

NICHOLAS E. PAINE. [L. S.]
L. S. DREW. [L. S.]

Signed, sealed, and delivered in presence of W. Darrow & George Cox, as witnesses to the signature of Nich's E. Paine.

And on the same 28th day of February, A. D. 1882, a citation was duly issued out of this court, and was returned duly served April 11th, A. D. 1883, which said citation is hereto annexed.

41 UNITED STATES OF AMERICA, *ss:*

To the Central Vermont Railroad Company, a corporation duly and legally chartered, organized, and transacting business and having its principal office at St. Albans, in said district of Vermont, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the United States circuit court for the district of Vermont, wherein Nicholas E. Paine is plaintiff, and you, the said Central Vermont Railroad Company, are defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Jnstice of the said Supreme Court of the United States, this 28th day of Feb'y, A. D. 1883.

HOYT H. WHEELER.

[Circuit Court U. S. A., Vermont District.]

42 UNITED STATES OF AMERICA, }
District of Vermont, } *ss:*

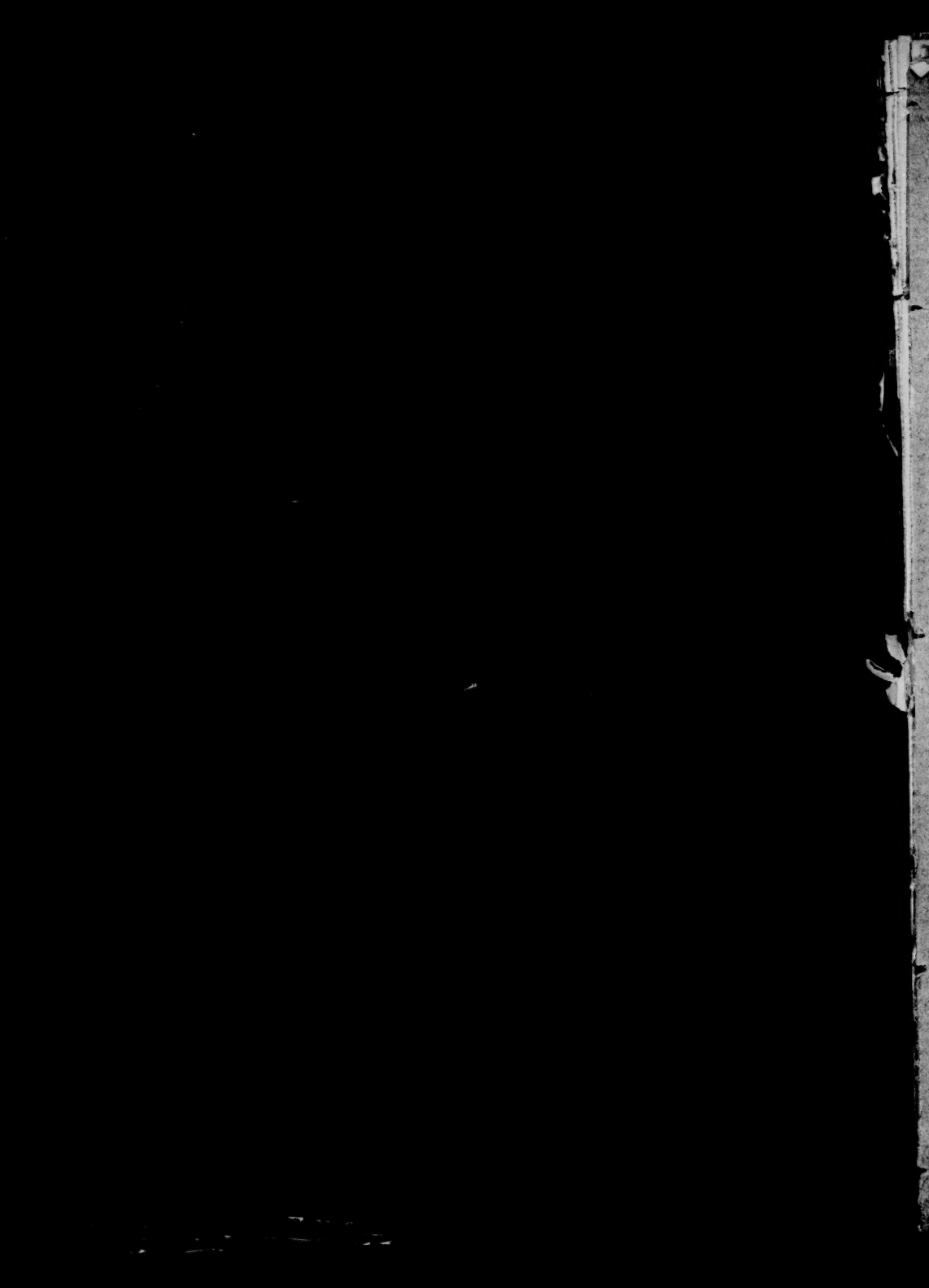
At Northfield, in said district, on the 9th day of April, A. D. 1883, I served this citation on the within-named defendant, the Central Vt. R. R. Co. by delivering a true and attested copy of the same to George Nichols, clerk of said corporation.

Attest: WM. W. HENRY,
U. S. Marshal.

Fees, service	$2 00
49 miles travel	2 94
1 copy	50
	$5 44

[Endorsed:] Citation. Nicholas E. Paine *vs.* The Central Vt. R. R. Co. Supreme Court U. S., October term, 1883. H. S. Royce, Hard & Safford, attorneys. Returned served April 11th, 1883. Geo. E. Johnson, deputy clerk.

Endorsed on cover: Vermont C. C. U. S. No. 221. Nicholas E. Paine, plaintiff in error, *vs.* The Central Vermont Railroad Company. Filed 27th April, 1883.



118-162

APR 1 1886
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM. 1885.

No. 221.

NICHOLAS E. PAINE,
Plaintiff in Error,
against
THE CENTRAL VERMONT RAILROAD COMPANY,
Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
For Plaintiff in Error.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States.

NICHOLAS E. PAINE,
Plaintiff in Error,

AGAINST

THE CENTRAL VERMONT RAILROAD COMPANY,
Defendant in Error.

Brief for Plaintiff in Error.

No. 221.

STATEMENT.

Nicholas E. Paine, the plaintiff in error, sued the Central Vermont Railroad Company on the following obligation :

"26. $5,000.

"BOSTON, July, 10th, 1873.

"On demand after date, with interest, we promise to pay to the order of H. B. Wilbur, Treasurer, five thousand dollars.

"CENTRAL VERMONT R. R. Co.,
"As Receivers and Managers Vermont Central and Vermont and Canada R. R.
"By H. B. WILBUR,
"Treasurer.

"No. 8. Value received. Approved.
"J. GREGORY SMITH,
"President.
"H. B. WILBUR,
"Treasurer."

The note was executed, as to time and place, according to its purport, and was delivered to John Q. Hoyt, of New York, in consideration of $5,000 loaned to the company. Hoyt delivered the note to plaintiff for value about November 1st, 1873—some three and one-half months after its date.

The plea of the defendant averred that the note was given for $5,000 advanced by Hoyt & McKinney, under an agreement that it should be held until an assessment and call covering its amount should be made on the stock of defendant company standing in the names of Hoyt & McKinney, and on August 10th, 1883, an assessment was so made, and on October 28th, 1873, the $5,000 so advanced was applied in payment of said assessment and the note thereby paid and extinguished, and that the note came to plaintiff as security for a pre-existing debt from Hoyt, or Hoyt & McKinney, long after its payment and extinguishment, of which plaintiff had full knowledge, and long after it ceased to be current.

Under a written stipulation of the parties the case was referred to a Referee, and, upon the facts as reported by him, and adopted by the Circuit Court as its own findings, judgment for defendant was ordered and entered on November 7th, 1882.

The facts so found appear in the record (pp. 7, 8, 9, 10), as briefly as they may be here stated.

ASSIGNMENTS OF ERROR.

1. The Court erred in holding that the note in suit was overdue when transferred to plaintiff.

2. The Court erred in receiving evidence concerning, and, also, in giving legal effect to, the alleged collateral verbal understanding between the defendant company and Hoyt.

3. The Court erred in holding that the plea of payment was established and that equities existed in favor of the defendant which constituted a defense to the note.

4. The Court erred in refusing to give effect to the promise of defendant company, through its president, to the plaintiff, to pay the note in suit.

5. The Court erred in giving judgment for defendant.

ARGUMENT

For Plaintiff in Error.

1. The Court below erred in holding that the note in suit was overdue when transferred to plaintiff.

The Court below rested its judgment upon the proposition that the note was overdue when transferred to the plaintiff, and hence taken subject to such defenses as existed against Hoyt—that the note, having been transferred after the lapse of about three and one-half months from the date of its issue, and although transferred before any demand of payment had been made, must, under the presumptions of law relating to demand notes, be presumed to have been dishonored. We

maintain that the note in suit was not dishonored until demand; but, if otherwise, we will attempt to show that, upon the circumstances of the case as presented by the record, the presumption of dishonor was a strained and unnatural one, and rested upon considerations which the circumstances of the case do not support. The learned Court below was, we think, misled by its attempt to deduce, from adjudged cases, an arbitrary standard—a maximum limit—of *reasonable time;* and decided the case, under the erroneous belief that no adjudged "case shows that more than three months can reasonably be overlooked" (Record, p. 13, Opinion). Instances may be readily cited where the Courts, applying the doctrine of reasonable time to demand notes, have held that the presumption of dishonor was not justified upon the lapse of periods ranging from three months to a year and a half, or more (Vreeland vs. Hyde, 2 Hall, N. Y., 249,—19 months; Hendricks vs. Judah, 1 Johns., 319,—1 year; Sanford vs. Mickles, 4 Johns., 224,—5 months; Chartered Mercantile Bank, &c., vs. Dickson, L. R., 3 P. C., App., 574,—10 months; Merritt vs. Todd, 23 N. Y., 28,—3 years).

There can be, in the nature of things, no arbitrary limit of reasonable time applied to demand notes. Each case stands upon its own peculiar circumstances. This Court has thus presented the rule in Morgan vs. United States, 113 U. S., 476, 501, Mr. Justice MATTHEWS delivering the opinion of the Court, *arguendo*, says:

"The rule, as to ordinary negotiable paper, payable on demand, is that it is not due, without demand, until after the lapse of a reasonable time within which to make demand; and what the length of that reasonable time is may vary according to the circumstances of particular cases, and must be governed very largely by the intentions of

the parties, as manifested in the character of the paper itself, and the purposes for which it is known to have been created and put in circulation."

Supposing that the foregoing doctrine is applicable to the case at bar the question then is, what were the "intentions of the parties as manifested, (1st) in the character of the paper itself; and, (2d) in the purposes for which it is *known* to have been created and put in circulation."

The character of the note—as a *negotiable interest-bearing* obligation—manifests the intention of the parties that it was to remain outstanding for something more than a nominal time, and might be negotiated. The significance of a provision for *interest* in a demand note has been variously estimated in the decisions, but no court has gone so far as to disregard it. Perhaps the fairest presentation of this branch of the argument, can be made in the language of the standard text book—(DANIEL ON NEGOTIABLE INSTS., pp. 451, 452):

"When the note is payable on demand *with interest*, it would seem to have been intended as a *continuing interest-bearing security;* but upon this question, as upon those already discussed respecting notes payable on demand, the authorities are in painful contrariety. * * *

"Where these questions remain undetermined the authorities are so much at war that it would be difficult to predict what rule would commend itself to the Court. It seems to us that where the note was indorsed at the time of making, and whether it bore interest or not, it should be regarded as a *continuing security*, and would not be overdue in the hands of the payee, either so as to open equities or to discharge the indorser until payment was demanded and refused. * * *

"The following observations, in 'BYLES ON BILLS' on this subject, seem to us worthy of quotation. Says the author: 'A common promissory note payable on de-

mand differs from a bill payable on demand, or a check, in this respect: the bill and check are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note payable on demand is very often originally intended as a continuing security, and afterwards indorsed as such. Indeed, it is not uncommon for the payee and afterwards the indorsee, to receive interest periodically for many years on such a note. *And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be that, though the holder may demand payment immediately, yet he is not bound to do so.*'

"The *same circumstances and considerations* which determine the question whether or not a bill or note payable on demand has become overdue, so as to *let in equitable defenses by the original parties* against the transferee *alike determine* whether or not the presentment has been in a reasonable time so as to charge the drawer or *indorser*." [In the present case the Central Vermont Company is liable as indorser as well as maker; and the liability as indorser is enforceable, under the common counts, in this action.]

The author makes, also, the following distinction, applicable to the present case:

"When the note payable on demand has been given for a *loan of money*, it would then seem clear that it was intended as a *continuing security*, and that the immediate presentment would not be necessary in order to charge the indorser. In Scotland, as well as in the United States, this view has been taken, and though high authority has maintained a different doctrine, we can but regard it as one which strikes the mind with the utmost force."

Daniel, Neg. Insts., p. 451.
Vreeland vs. Hyde, 2 Hall (N. Y.), 429.
Thompson on Bills (Wilson's Ed.), 301.
Leith Banking Co. vs. Walker's Trustee, 14 S. D. B., 332.

Speaking of demand notes payable *with interest*, the Supreme Court of Connecticut says:

"The note in question, although on demand and

negotiable, is also expressed to be 'with interest.' From this and the other facts found it sufficiently appears that an immediate demand was not contemplated, and that the note was intended to lie as *continuing security.*

Rhodes vs. Seymour, 36 Conn., 6.

In this case it was held that the note would not have been presumed to have been dishonored by the lapse of time, but for a positive statute (the policy of which was questioned), which prescribed that promissory notes on demand remaining unpaid four months from their date should be considered overdue and dishonored at that time.

[The statute of Massachusetts (Gent. Stats. 293, § 8) providing that a promissory note payable on demand for the purpose of demand and notice to charge an *indorsee* shall be deemed to be due in sixty days after its date, has no application to this case. It is simply a statutory regulation of the contract of indorsement, or rather it imposes a statutory incident upon that contract made with respect to demand notes. It raises no presumption of reasonable time. It is an arbitrary rule intended to apply to the *indorser's* liability on demand notes of every description, issued under the most widely dissimilar circumstances, and with the greatest diversity of intention. It leaves the common law presumptions in full force, except as it *expressly* modifies them, and the question as to whether a demand note is to be deemed dishonored so as to let in equitable defenses in favor of the *maker*—whether more or less than sixty days have elapsed—is still to be determined by the circumstances of the particular case. There is a similar statute in Vermont (Rev. Stats., § 2013).]

In New York it is "settled law that a note payable on demand *with interest* is a *continuing security* against an indorser until actual demand."

Shutts vs. Fingan (N. Y. Court of Appeals, Nov. 24, 1885), 1 Cent. Rep., 731.

See also:

Parker vs. Stroud, 98 N. Y., 379.
Merritt vs. Todd, 23 N. Y., 29.
Pardee vs. Fish, 60 N. Y., 265.

In England a promissory note on demand *with interest* is regarded as a continuing security.

Brooks vs. Mitchell, 9 M. & W., 15 (cited in Morgan vs. U. S., 113 U. S.)
Gascoyne vs. Smith, McClel. & Younge, 338.
Borough vs. White, 6 Dowl. & R., 379.

THE SIGNIFICANCE OF THE PROVISION FOR INTEREST, as bearing upon the question of apparent intention, and hence of reasonable time is forcibly presented by COWEN, J., delivering the opinion of the Court in *Wethey vs. Andrews* (3 Hill, 582). He says:

"Here is a note payable to bearer *on demand, with interest;* and it came to the plaintiffs' hands, as we must intend some four or five weeks after it issued, for it is not shown that he took it after that time. * * If it had not been on interest, not being a bank note, I should have thought it right to presume that it had been demanded, and payment refused, perhaps even by the time when Grimshaw obtained it. I would presume it on the unwillingness which every prudent man feels *to have his money lie idle;* and would presume that the holder had seen or sent to the maker immediately, and pressed him for payment. But I think that directly the contrary is to be presumed with regard to this note which bore *interest.* No one would understand the parties to intend that these words meant interest for a few weeks only; nor would the payee or *purchaser of a note ordinarily desire to take it on the terms of a payment so soon. It would be contrary to the general course of business to demand payment short of some proper point for computing interest; such as a quarter, half a year, year, &c.*

In the late case of *Borough vs. White* (6 *Dowl. and Ryl.*, 379), all the judges concurred expressly in saying that such a note cannot be considered as dishonored till it is demanded and payment refused; and they put themselves on its being a continuing note upon its face."

This, we submit, is the business view, and the legal view of the case. The fact that the demand note of a corporation bears *interest* cannot be held to be less than one of the "circumstances of the particular case," significant of the "intentions of the parties as *manifested in the character of the paper itself*" (Morgan vs. United States, 113 U. S).

In Lockwood vs. Crawford, 18 Conn., 371, it was said that the *tenor* of a demand note *with interest*, independent of extrinsic evidence, sufficiently shows that the time of payment is intended to be in the future, as "interest could only accrue from forbearance of payment," per CHURCH, C. J.

The English law on the subject of demand notes has the great merit of being plain and certain. In order that it may be certainly known when the Statute of Limitations applies to demand notes, it is there held that it begins to run from their date.

Byles on Bills, 342.

Such is the rule in this country.

In England in suits against endorsers on demand notes, certainly those payable with interest, it is settled that such a note is a continuing security; that the endorser remains liable until an actual demand of payment; and that the holder, as between him and the indorser, is not chargeable with neglect for omitting to make such demand within any par-

ticular time. And such is the general, if not universal, rule in this country.

Byles on Bills, 168.

This rule also has the merit of being plain and certain.

In England it is settled law that a demand note is not considered overdue until it has been actually presented and refused, so as to let in the equities of the maker as against the indorsee.

Byles on Bills, 168.

" A note payable on demand is not to be considered as overdue, without some evidence of payment having been demanded and refused. Although it be several years old, and no interest has been paid on it. 'A promissory note,' says Mr. Baron PARKE, 'payable on demand, is intended to be a continuing security; it is quite unlike a check which is intended to be presented speedily' (White vs. Mitchell, 9 M. & W., 15").

Id., p. 268.

In this country the Courts have shown a disposition to adopt the rule that a demand note, unless transferred within reasonable time, is to be considered as overdue. Nothing could be more uncertain than this rule, since it requires a careful scrutiny in each as to its circumstances;—place of business, situation, and relation of parties.

Under this view there is no certain rule to determine when such a note is overdue or dishonored.

It is submitted that the English rule on this point is the better one, and the one which this Court should sanction.

But it is not necessary to the success of plaintiff in error that this Court should go so far as to hold, with the

weight of authority, that a demand note, with interest, is not to be deemed dishonored so as to discharge the indorser and let in equitable defenses, until *actual demand.* It is needful only to insist that the interest-bearing character of the obligation is an inherent evidence of the intention of the parties, and that the apt, natural and reasonable inference from a stipulation for interest is that the obligation is to be outstanding for such a period as will give the provision some value and effect.

Now, what were "the purposes for which it was known that it [the note] had been created and put in circulation"? (Morgan vs. U. S., *supra*).

It appears by the record that the $5,000 loaned on the note in suit was a part of sums borrowed by the company *for the purpose of enabling it to carry on its operations pending the coming in of installments on subscriptions to its capital stock.* On April 30, 1873, $2,000,000 had been subscribed to the capital stock of the company. The company was organized May 27, 1873 (Rocord, pp. 7, 8). The note in suit was given less than two months later. The company was then practically without funds, but its obligations were amply secured by actual subscription and the promise of incoming installments, covering a future period of half a year or more. From the time the note was given the condition of the company was necessarily to be one of increasing financial strength and responsibility.

The case was one of loan to a debtor presently unable to repay, but assured of large resources in the future.

As each installment of subscription became due and was paid, the added resources thus arising contributed to put the company in the financial position which was necessarily in contemplation when the loan was made to a moneyless corporation. The presumption of dishonor could not fairly arise until the development in the affairs and finances of the company, which was in apparent contemplation when the note was made, had fully eventuated. Paine was acquainted with the subscriptions to the company, and with its situation and circumstances (Record, p. 8), its resources, present and prospective, at the time it borrowed this money and issued its note. He knew the *public* facts—not the alleged private arrangements (Record, p. 8)—and from these facts, together with the significant circumstance that the note was expressed to be with interest, the clear inference was that the note was intended to be a continuing obligation.

We are not concerned, in this aspect of the case, with any collateral and unwritten understanding between the parties, in conflict with the written promise which the company offered to the world at large; but it is worth while to observe that even by the conditions of this private agreement it was intended that the note should be outstanding until the calls were paid and certificates of stock issued, a period, as it transpired, of upwards of six months (Record, p. 9). The *public* facts of the case indicated, and the private understanding actually provided, that the note was to be outstanding for a substantial period.

It was transferred long before the time of its stipulated return (as alleged) and while it was still a subsisting obligation unpaid and undischarged. It was trans-

ferred at a time when the company *intended that it should be outstanding*, and hence transferrable. Under the evidence offered by the company, it is hard to conceive how it can avail itself of a presumption which is not only in conflict with the generally known circumstances of the case, and with the character of the note itself, but in direct conflict with the facts relied on by the defense. The presumption of dishonor is not available to one who affirmatively shows that his obligation was to remain outstanding for a much longer time than the time at which, as he asserts, the presumption should arise.

2. The Court erred in receiving evidence concerning, and also, in giving legal effect to, the alleged collateral, verbal understanding between the defendant company and Hoyt.

The defense asserted, viz.: that the note, according to a contemporaneous, verbal understanding between the parties to the transaction, was to stand against assessments on his subscription to the defendants capital stock ; could not *even as against Hoyt*, be either *treated as an equity or proved as a fact.*

The Court below held that evidence of such a verbal understanding did not contradict or vary the note or its obligation. We submit that this was erroneous. The obligation of the note was that *$5,000 in money should be paid* on demand ; and we submit that any agreement to discharge this liability *in any other manner* than by the payment of $5,000 in money, varied

the engagement and contradicted the obligation of the note. Whether the collateral agreement was that the note should be *paid in stock*, or that it should be held as a *receipt*, *sub modo*, for an anticipated payment of assessment, and delivered up on the issue of stock,—whatever may have been the technical character of the collateral agreement, evidence of *any* agreement that the note *was not to be paid in money according to its tenor*, is in variation and contradiction of the engagement, and no subtlety of reasoning or nicety of distinction can show otherwise. Such evidence is inadmissible, and such an agreement ineffectual, to impair any right of recovery on the note. It was impossible for the defendant to reserve by oral understanding the right to discharge its obligation in any different or other manner than by compliance with the terms of the written instrument. This Court has sharply defined the familiar rule, applicable here, in the cases of Specht vs. Howard, 16 Wall., 564, and of Forsythe vs. Kimball, 9 1 U. S., 291, Mr. Justice SWAYNE delivering the opinion in both cases. In the latter he says:

"It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, or add to or subtract from the absolute terms of the written contract. 2 Pars. on Bills and Notes, 501; Specht vs. Howard, 16 Wall., 564."

"Parol evidence of an agreement made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund or in any other way than that specified in the instrument, or to make the payment depend upon condition."

Brown vs. Spofford, 95 U. S., 482.

Danl. on Neg. Insts., § 81 *et seq.*, and cases cited.

"A verbal condition cannot be annexed to a promissory note."

Potter vs. Ernest, 45 Ind., 418.

It cannot be shown that a note payable absolutely was to be returned in a certain event which has happened.

Tower vs. Richardson, 6 Allen, 351.

The case of Spring vs. Lovett (11 Pick., 416) is identical in all substantial aspects with the case at bar. That case was *assumpsit* on a promisory note made by the defendant on April 28th, 1828, payable to Thomas Buffum & Co. for $465.83, with interest, on demand, and indorsed to the plaintiff in January, 1829.

SHAW, C. J., delivering the opinion of the Court, said :

"The evidence here shows that the note was endorsed long after it was due, and was therefore *clearly within the principle* that he who takes a bill after it is due takes it *subject to all the objections and equities to which it was liable in the hands of the person from whom he took it.* Sargent vs. Southgate, 5 Pick., 317.

"But this point is quite unimportant to the present case, because we are all of the opinion that the defense relied upon, *were it set up against the original promissee*, could not be sustained. The facts relied upon, and to prove which the parol evidence was offered, are, that the defendant having purchased a water-power, Buffum & Co. and others interested in several manufactories, to which it was believed that such water-power would be auxiliary, had agreed to purchase it of him at a price fixed ; that for reasons satisfactory to both parties, it was thought best to delay taking deeds of the defendant, but in the meantime each of the parties advanced to the defendant a sum of money to the amount of his share ; and that the note in question was thus given by the defendant to Buffum & Co. on their advancing their share ; and that it was further agreed, that upon the defendant's giving a deed to the

promissees for their share, the note should be given up.

"To admit this evidence for this purpose would be directly repugnant to the salutary rule that parol evidence cannot be received to contradict, alter or control a written obligation. The note is an unqualified promise to pay a specific sum of money on demand; the parol evidence would make it defeasible upon the performance of a distinct collateral act, that of giving a certain deed. The written promise is absolute and indefeasible; the parol agreement would make it conditional and defeasible. Such a parol defeasance would manifestly alter and control the character and effect of the written obligation. * * * It cannot be maintained upon the facts stated that this note was given without consideration. The consideration was the amount of cash actually advanced; there is no pretense that the money was advanced solely upon the agreement to have a deed, but it was upon the consideration of having a note payable on demand. It is said to be a hard case, and upon the facts shown it certainly appears to be so. But if it is so, it is because the defendant relied too confidently upon a mere temporary arrangement and undertaking, and failed to put the whole of his contract into such a form as to render it legally available."

3. The Court erred in holding that the plea of payment was established and that equities existed in favor of defendant, which constituted a defense to the note.

The Court finds that the note was to "stand against Hoyt's subscription for stock," and was to be delivered up with the collateral bonds on delivery to him of stock certificates for his stock (Record, pp. 8, 12).

It will be observed that upon this finding the note was to stand against his subscription generally—against no *particular assessment*—and at the time the note was

transferred all previous assessments had been paid in cash by Hoyt, and no further assessment would become due and payable until a month later (Record, p. 8).

There was therefore no debt from Hoyt to the company, due at the time of the transfer, which could have been set off in an action then brought by Hoyt on the note;—*a fortiori*, none which can now be offset against Paine.

In an action by Hoyt upon the note the company might possibly have had a right to set off the amount of any matured demand in its favor against him, but this right could not be shown to have accrued by virtue of any collateral oral agreement engrafting the right of set-off upon the written contract; so interweaving the verbal reservation with the written promise, as to make the right of set-off an inherent contradiction to the express terms of the note.

In St. Louis Perpetual Insurance Co. vs. Homer, 9 Metc., 39, the Court say: DEWEY, J.

"The proposed evidence is clearly inadmissible, being, as it seems to us, in direct violation of well-settled principles regulating the admission of evidence. The note is perfect and complete in itself, and is an absolute contract for the payment of a certain sum of money. This contract the defendant would control by evidence of a verbal agreement, made concurrently with the written contract, affecting the nature of the promise, engrafting upon it a new stipulation, by which the parties agree that this absolute promise shall be in truth a conditional one; and in lieu of the promise to pay the sum stipulated in the note, the defendant proposes to show that any sum which might be found justly due on account of a claim which the makers of the note had against the plaintiffs, upon a certain policy of insurance given by the plaintiffs, should be deducted therefrom and applied in or towards satisfaction of said note."

The loan of money by Hoyt to the company and the taking of a promissory note, secured by collateral, for the amount of the loan, constituted a complete transaction. The transaction was an entirety in all its legal requisites, and the note issued subject to no *inherent infirmities.*

As an *independent right of* set-off, the defense is incapable of assertion against Paine, because, *(a) a right of set-off is not an equity*, and *(b)* if such a right be regarded as an equity, it had not accrued at the time the note was transferred, *(c)* in Vermont no debt can be set off in an action unless it be the personal debt of the plaintiff, and *(d)* no such set-off is pleaded.

(*a*) "A set-off is not an equity; and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself, and the transferee is not subject to a set-off which would be good against the transferrer, arising out of collateral matters."

2 Dan'l Neg. Inst., § 1435.
Chitty on Bills, p. 220.
Byles on Bills (Sharswood's Ed.), p. 529.
Parsons' N. & B., 603, 604.

And the leading case of
Borough vs. Moss, 10 B. & C., 538.

(*b*) And where, as in some States, independent rights of set-off against the payee and in favor of the maker have been admitted, as against a transferee of overdue paper, or even against the original payee, it is uniformly held that the debt offered in set off must have accrued and become payable at the time of transfer, or, as against the original payee, at the time the suit is brought.

Waterman on Set-off, § 109 *et seq.* and cases cited.
McAlpin vs. Wingard, 2 Rich., 547.
Martin vs. Kuntzmuller, 37 N. Y., 396.

The rule is thus presented, by high authority:

"An indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters. Therefore the indorsee of an overdue note is not liable to a set-off due from the payee to the maker. And although the indorsee had notice, gave no consideration and took the bill to defeat the set-off."

Byles on Bills, p. 265.

The English cases are uniform on this point.

Watson vs. Mid-Wales Railway Company, L. R., 2 C. P., 593.

Head note: When an equitable chose in action has been assigned, the debtor cannot set off against the assignee a debt which has accrued due to him from the assignor since the notice of assignment, though resulting from a contract entered into previously, unless from the nature of the transaction it appears to have been intended between the original parties that the one should be set off against the other.

The assignees of a Lloyd's bond sued the makers in the name of the original bondholder; the makers sought to set off arrear of rent due from the original bondholder, which had accrued due since notice of the assignment, upon a lease granted after the making of the bond, but before notice of assignment. On equitable pleading, stating these facts:

That defendants could not set off the arrears of rent. Opinion: "The question, of fact, amounts to this: whether the assignee of a debt payable in future takes it subject to its being a security to the debtor for any payment accruing due under a contract made with him by the assignor before the assignment, and under which the assignor may become indebted to his debtor. Or it may, stated thus: Whether, where there are cross debts accruing, but not yet due, there is, independently of the legal rights of the parties, a distinct equitable right that the balance only should be considered due. The cases fail to establish any such position."

To the same effect is the case of Jeffryes vs. Agra & Masterman's Bank, L. R., 2 Eq. Cases, 674.

A. being indebted to Bank B. for advances, handed to them certain marginal receipts of Bank C. for £2,000, representing deposits lodged there until the advice of payment of certain bills on a firm in Bombay, and discounted by A. with that bank; the course of dealing being for Bank C., upon receiving the bills, to pay over to A. or place to this credit in his banking account, less than the full discount value of the bills, retaining the difference as a security for payment in full at maturity of the discounted bills. When advised that the bills had been paid in full, the bank was in the habit of carrying over the retained margin to the credit of A. in his general banking account.

Notice of A.'s assignment of the marginal receipts was given by B. to C. on the same day that A., who was largely indebted to C. upon an overdrawn account, and upon contingent liabilities upon bills of exchange not then matured, suspended payment.

Held, as between B. and C., B. was entitled to the £2,000 by the marginal receipts, subject only to a set-off of any sums actually due and payable to C. by A. at the time when such marginal receipts became payable, upon liabilities contracted before notice was received by C. of the assignment to B.

Opinion: "Then they say further, that there were very heavy liabilities outstanding, and that they should have retained, when they became due, those balances as against those outstanding bills, I apprehend they never could do that in any court of law, and of course there is no equity of the kind; you cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time.

"A debt payable in future cannot be pleaded in bar of a present demand," per MARSHALL, C. J., in Scott vs. Jones, 1 Brock., 246.

(*c*) The statute of Vermont, then and now in force, is as follows (Rev. Laws, § 915, formerly Rev. Stat., C, 24, § 1):

"If the plaintiff, in an action founded on contract,

express or implied, is indebted to the defendant in such action on contract, express or implied, the defendant, after pleading the general issue, or confessing the plaintiff's cause of action, may plead such indebtedness in offset."

The decision in Phelps vs. Buckley, 20 Vt., 17, is thus summarized in the Syllabus :

" Under the statute of this State (Rev. Stat., C. 34, § 1) pleas in offset are only allowed between the actual parties to the suit.

" In an action upon a promissory note payable to one or bearer, and which is sued in the name of a bearer, the defendant cannot plead in offset a note, which he holds as bearer, executed by the payee of the note in suit although it appear that the plaintiff holds the note in suit in trust for the payee, and that the defendant, before any transfer of the note in suit, gave notice to the payee that he was the owner of the note which he now attempted to plead in offset."

(*d*) No right of set-off is pleaded.

The following English cases are pertinent to this inquiry :

Smith, Fleming & Co.'s Case, *re* Commercial Bank Corporation, L. R., 1 Ch. App., 538 :

Head Note : " The principles on which the Court acts under section 95 of the Companies Act, 1862, considered.

" At the time when an order was made for winding up a company, the company was the holder of bills accepted by S. & Co., which would become payable in six months. At the same time S. & Co. were holders of bills drawn by the company, which the drawees, shortly after the winding up order, had refused to accept :

Held, reversing the decision of the Master of the Rolls, that S. & Co. had no right to set off against each other the present liability of the company under their dishonored bills, and the future liability of S. &. Co.

under their acceptances, not any right to have the bills retained by the official liquidator, until a right of set-off arose, but that the official liquidator ought to be allowed to negotiate the bills accepted by S. & Co.

" This case depends, as it seems to me, wholly upon the operation of the Companies Act, 1862, for there is not, as I apprehend, any right on the part of Messrs. Smith, Fleming & Co., either at law or in equity, to set off against their future liability upon bills accepted by them, the present liability of the company to them upon the company's dishonored acceptances. Nor do I see any ground independently of any statute, upon which Messrs. Smith, Fleming & Co. can be entitled to insist upon their acceptances being retained and held by the company until they shall become due, in order that the right of set-off, which would then arise, may be made available to them. As to any present right of set-off, there is, on the one side, a debt presently due, and on the other, a liability which would accrue at a future date; and the debt cannot, as I apprehend, be set off at law against the liability, nor can it, as I think, be so set off, in equity. The right of set-off may, indeed, as was insisted in argument, have subsisted in equity before it was introduced into the law by statute; but no authority was cited in argument, and none, as I am aware, can be found, in which the right was ever held to exist in equity in such a case as the present; and set-off in bankruptcy does not, I think, apply.

In re Paraguassu Steam Tramroad Company, Black & Co.'s case, L. R. 8 Ch. App., 254, it was held that in winding up a company debts cannot be set off against calls.

" A contractor agreed with a company to supply them with steam engines at a fixed price, and to take shares in the company, payment of the calls on which should not be enforced until at least two engines should have been paid for, and the contractor might set off against the calls the money due to him. The contractor took shares accordingly, and made two engines for the company, which were not taken by the company or paid for. The company was afterwards

ordered to be wound up by the Court, and a call was made by the liquidator. Held (reversing the decision of BACON, V. C.), that the contractor could not set off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls."

The principle established by the English cases above referred to, that debts cannot be set off against calls, as first established in *Grissell's* case (L. R., 1 Ch., 528) is thus expounded in Black & Co.'s case (L. R., 8 Ch., App. 261), by Lord Chancellor SELBOURNE.

"I think it right rather in consequence of what was said by the Court of Common Pleas in the case of the Brighton Arcade Company vs. Dowling than for any other reason to observe that I entertain no doubt whatever that Grissell's case was decided on the soundest principles. What is the ordinary law of set-off? It is what in the civil law was called compensation and simply means this: That when you have got two cross demands of a nature substantially the same, and due to and from A. and B. in the same right, that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. *But it is essential in such cases that the rights should be substantially the same.* If they were apparently the same at law but different in equity set-off would not be allowed here; nor do I suppose that in the present state of the law it would be allowed at common law either."

The same principle is established by the judgments of this Court, particularly in the case of Sawyer vs. Hoag (17 Wall., 610), where it was held to be "well "established that the capital stock of a corporation, "especially its unpaid subscriptions, is a trust fund for "the benefit of the general creditors of the corpora-"tion" (p. 620).

In that case the Lumberman's Insurance Company of Chicago invited subscriptions to the capital stock of the company, stating to those whom they invited to subscribe that only 15 per cent. would be required to be paid down in cash, and that the remaining 85 per cent. would be lent back to the subscriber and a note taken therefor, payable in five years with 7 per cent. interest, payable semi-annually, secured by collateral security satisfactory to the directors of the company.

Sawyer subscribed for fifty shares of the stock. He gave his check to the company for $5,000, the full amount of his stock, and his note payable to it in five years from date, for $4.250; that is to say, for 85 per cent. of the par value of the stock with interest, and delivered to the company as collateral security for the payment of his note satisfactory securities and received from the company a check for $4,250 or 85 per cent. of the par value of the stock by way of and as for a loan thereof from the company.

Sawyer authorized the company to sell the collaterals at auction in case of default in the payment of the note.

The company treated this as a loan by the company to him and his stock as fully paid for.

This was held by this Court to be a device to change the nature of the debt from a stock debt to a loan, and that it was not a valid payment as against creditors of the corporation however it might be as between the company and the stockholder.

The Court, by Mr. Justice MILLER, said (p. 621):

"We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if agreeing beforehand to turn

the stock debt into a loan the appellant had brought the money with him, paid it, taken a receipt for it and carried it away with him.

"The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose. And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund and enabled both him and the directors to deal with it freed from that charge."

The result of it was (p. 622) that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred installments properly secured.

It follows, therefore, in the case at bar, that it was not competent for the defendant company to deal with the stock subscription of Hoyt, and the trust fund thereby created in the manner attempted; that is to say, to agree beforehand with Hoyt that a note which the company had given him for money lent should stand against his subscription to its capital stock. As such contract could not be enforced by Hoyt, it is not enforceable against him, and the two obligations or liabilities are not the subject matter of a set-off, even if both had been due and payable at the date of the assignment of the note in question to the plaintiff; for the reason stated by Lord Chancellor SELBOURNE (p. 254), "that they are not cross-demands in the same right."

Re Agra and Masterman's Bank, L. R., 2 Ch. Ap. Cases, 391, the head-note briefly states the case:

"A bank gave to D. T. & Co. a letter addressed to them, and expressed thus: 'No. 394. You are hereby authorized to draw upon this bank to the extent of £15,000, and such drafts I will undertake duly to honor on presentation. This credit will remain in force for

twelve months from date, and parties drawing bills under it are requested to indorse particulars on the back hereof. D. T. & Co. drew bills under this letter to the amount of £6,000, and indorsed them to the Appellent who duly indorsed particulars on the letter of credit. The bank was afterwards wound up, and D. T. & Co. were indebted to the bank to an amount exceeding what was due on the bills.

HELD (reversing the decision of WOOD, V. C.), that whatever might be the effect of a letter of credit at law, it constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank and D. T. & Co., and that tne appellant was entitled to prove for the amount due on the bills, without regard to the state of account between the bank and D. T. & Co.

CAIRNS, L. J., says, generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature of terms of the contract that it must have been intended to be assignable, free from and unaffected by such equities."

The equities subject to which a transferee takes overdue paper are defined and certain. They are failure or want of consideration, fraud and payment. No one of these defenses is found by the Court to have existed at the time the note was transferred. The transaction between the company and Hoyt is found to have been a loan by Hoyt of $5,000, and a delivery by the company of its absolute promissory note for that sum, together *with $10,000 in amount of income and extension bonds as collatered security.* The consideration was "actual cash advanced," (see the parallel case of Spring vs. Lovett, *ante* p. 15) and could not have been more adequate. Fraud is not pretended. Payment is equally disposed of by the finding that note

was only to cease to be obligatory on the delivery of certificates of stock to Hoyt.

In the case of Spring vs. Lovett, (*ante*, p. 15), deeds had been tendered to the transferee of the note, and he declined to accept them. In the present case the company, long after the transfer of the note to Paine, delivered the certificates of stock to Hoyt (Record, pp. 8, 9). When the certificates were offered to Hoyt, he informed the company that the note was not at hand and suggested that it should retain the stock till the note should be delivered to it. The company chose to disregard this suggestion and to disregard the circumstance, amounting in law to notice, that the note had been transferred.

Griswold vs. Davis, 31 Vt., 390.

The finding of the Court is that by the understanding of the parties the note was to be delivered up upon delivery to Hoyt of stock certificates (Record, p. 8).

The company was not entitled to a return of the note till the stock certificates were delivered. If the note rested upon the consideration of money actually advanced or loaned (and there is no dispute on this point), and was to remain outstanding, and, hence, obligatory upon the company, until delivery of stock certificates, the delivery of stock certificates became the method of discharging the note and canceling the obligation. The legal effect of such an agreement is clearly to make the note payable in stock. While the note is outstanding and obligatory, and during the period when it was intended so to be, it cannot be deemed discharged; and whatever operates to bring the obligation to an end, and to entitle the maker to

have the note delivered up and canceled, is in law payment and discharge. This proposition does not seem to admit of argument. When Paine took the note it was obligatory and undischarged. With any subsequent dealings between the maker and payee he was not concerned. The note, even though overdue at the time of the transfer, was still negotiable.

Daniel on Neg. Insts., § 724, and cases cited.

Any attempt to pay and discharge a negotiable note, except to the party in whose hands it is found, is futile and unavailing.

Daniel on Neg. Insts., § 1230, and cases cited.

Such an attempt in this case has no legal bearing upon the rights of Paine, except as showing that the company, having voluntarily parted with the certificates of stock applicable to the note, and having disabled itself from performance to the *holder*, cannot now comply with, and, hence, cannot claim the benefit of the equities *between* the original parties to the note growing out of the collateral understanding.

If a note subsists as collateral security for the doing of an act, it is obligatory until that act is done, and is discharged by the doing of the act. If transferred before such a discharge, the transferee cannot take it subject to less favorable equities than existed between the parties to the original transaction. The payee, even in transferring a note which is overdue, transfers such equities, respecting its payment as subsisted in his favor; otherwise the transferee would not take subject to the equities *between* the original parties, but sub-

ject only to the *burden* of the equities in favor of the maker. That the company cannot avail itself of equities without an offer to perform to Paine, the duty which it owed to Hoyt with respect to the note seems to be sufficiently clear. If equities are to be admitted, the company must be deemed to have held the stock certificates applicable to the note, in trust for Paine, or whoever was the holder of the note, and having failed to tender them to him, it cannot avail itself of equities which do not arise or become complete in any aspect, except upon such a tender. Having failed to tender performance of the collateral understanding respecting the note, and having voluntarily put such performance out of its power, it cannot now set up as a defense, a right which it cannot and does not offer to exercise. The mere *right*, without an *offer*, and without even the *ability*, to discharge its obligation according to the verbal agreement, is a barren and unavailing defense.

4. The Court erred in refusing to give effect to the promise of the defendant company, through its president, to the plaintiff to pay the note in suit.

The Court found that, "The plaintiff called on the president of the defendant for payment of the note in suit, who told him the circumstances under which the note was given, but did not state that they would be relied on as a defense to the note, or that any question would be made about its validity, and requested him to wait and endeavor to get payment from Hoyt, and encouraged him that he would succeed in doing so. He had a similar interview with a like result afterwards, the president adding that if Hoyt did notpay the plaintiff's note the defendant would not ask him to wait

again, but *would provide for the payment of this one*" (Record, p. 9).

This suit was not brought until after another interview was had, in which "the president told him (the plaintiff) that he thought and had been advised that the circumstances under which the note was given would constitute a good defense to the note," and payment was refused (Record, p. 9).

The Court below declined to give to defendant's promise the effect of a waiver of the defenses now set up, upon the ground that there was no new consideration for any undertaking in this respect," and that it did not "appear that the plaintiff lost anything by reason of what took place on this subject."

We submit that the defendant's promise, made with knowledge of all the circumstances bearing upon its liability, was a waiver of the defenses now set up. The promise was not without consideration. The forbearance of the plaintiff at defendant's request to press his demand against the defendant, and his efforts to get payment from Hoyt, made a complete consideration for the waiver of a doubtful defense (1 Pars. on Conts., p. 470, and cases cited).

This promise, and request for time, having been *acted upon* by Paine, the company is estopped from setting up a defense inconsistent with its promise.

1 Greenl. on Ev., §§ 207, 208.
Frost vs. Saratoga Mut. L. Ins. Co., 5 Denio, 157.
Dezell vs. Odell, 3 Hill, 215.
Albie vs. Little, 5 N. H., 277.

The case of Franklin vs. March, 6 N. H., 364, is, with respect to the point under discussion, a parallel case. The action was assumpsit, by plaintiff as en-

dorsee, upon a negotiable promissory note or due bill. The material facts are thus stated in the report:

"On the 15th of February, 1831, Cochran (the payee) endorsed it (the note) to plaintiff, in part payment of a debt due from him to plaintiff, who on the same day presented it to the defendant for payment. The defendant then stated to the plaintiff that he did not know of Cochran's holding any negotiable note against him—that Cochran was then owing him—that he sold the hops to Cochran, as before stated, and received the said thirty dollars in part payment, and had supposed, until it was then shown to him, that the memorandum he gave was in the common form of a receipt; but that he now supposed it was negotiable, and he should be obliged to pay it, and that he would pay it if the plaintiff would wait a month or so. The plaintiff waited several months, and then commenced this suit. Cochran was indebted to the defendant, upon account, when the instrument was made, and continued to be so indebted.

PARKER, J.: The facts will support the position that the plaintiff took the note under such circumstances as to put him upon an inquiry relative to its validity; and if the case had rested here it might have been necessary to consider how far the facts stated would constitute a sufficient defense, as against the payee. But we do not find it necessary to examine that part of the case. The plaintiff having taken the note, presented it the same day to the defendant for payment; and if the defendant had then refused to pay it, the plaintiff might perhaps have obtained the amount from Cochran in some other way. But instead of this the defendant told the plaintiff that if he would wait a month or so he would pay the note, and the plaintiff has fully complied on his part, as he waited several months before commencing this suit. In this time the circumstances of Cochran may have materially changed, and the security of the plaintiff may depend upon the recovery in this case. * * * This case finds that the defendant, at the time the note was presented to him, stated that he had not supposed this was a promissory note—that he understood when he signed it that it was a receipt—and that he had claims against Cochran. But after stating all this,

the defendant closed by a promise that he would pay, notwithstanding these facts. Upon this the plaintiff relied, and the case stands therefore as if those facts had not been stated. *Any defense which those facts might have constituted was waived,* when the defendant said he would pay, notwithstanding, and he *cannot now be permitted to set them up in bar of the plaintiff's recovery.*"

In Waterman on Set-off, § 710, under the title, "*Right of Set-off against assignor, how waived,*" the rule is thus stated:

"Where, in an action by the assignee of a promissory note, not negotiable, against the maker, it appears that the defendant promised the assignee that he would pay the note, the defendant cannot avail himself of a set-off against the payee."

It is settled law that if the maker promise to pay the assignee (of a non-negotiable note) or transferee (of an overdue negotiable note), without stipulating for the deduction of an offset against the payee, the promise is a legal waiver of the right of set-off.

"And if such a promise be made to the assignee to pay him, the debtor cannot avail himself, in set-off, of claims he may have had, before and at the time of the assignment, against the assignor. *Such a promise amounts to a waiver of any set-off he might have.*"

Thompson vs. Emery, 27 N. H., 269.
Wiggin vs. Damrell, 4 N. H., 69.
Mayo vs. Giles, 1 Munf., 533.
Edson vs. Fuller, 22 N. H., 183.
Bridge vs. Johnson, 5 Wend., 341.
Mowrey vs. Todd, 12 Mass., 281.
Henry vs. Brown, 19 Johns., 49.

Mowrey vs. Todd, 12 Mass., 281, was assumpsit on a promissory note and agreement. The case was this:

The note was made by Todd to one Samuel Fisher

or order, dated June 8, 1813, for fifty dollars on demand with interest, and endorsed by Fisher in blank. The agreement was as follows: "Portland, June 8th, 1813. This may certify that I, Samuel Todd, do agree to pay my proportional share of the ransom given in St. Johns, December 9th, 1812, for the schooner 'Ospray,' by Captain Samuel Fisher, it being too hundred and sixty-one dollars and sixty-one cents, with interest after this date, when it appear that the said ransom is to be paid, as witness my hand, *Samuel Todd.*" On the back of this agreement was written the following, viz.: "For value received I hereby transfer all my right and interest in the within promise, being myself solely interested. To *Jabez Mowrey.*" The plaintiff read in evidence the deposition of James Savage, of Boston, testifying that some time in July or August, 1813, having in his possession, as attorney to the plaintiff, the note and agreement declared on, the witness gave notice to the defendant, then in Boston, that the same were left with him for collection, the one being endorsed by Fisher and the other assigned by Fisher, as the witness supposed, at the same time the first was endorsed, the witness having drawn the form of the assignment on the back of the agreement, and Fisher having agreed to execute it. * * * That the defendant observed to the witness *that Fisher owed him on another account*, and that he would obtain from him the balance before leaving Boston, to enable him to make up the money for the plaintiff, wishing the witness to deduct what Fisher owed him, but on the witness objecting to that course, *he undertook to satisfy the full amount of the plaintiff's claims.* On the trial the defendant produced Fisher's note to him, which was acknowledged to be good against Fisher.

PARKER, C. J.: "With respect to the right of the defendant to set off any demand he has against Fisher we think his engagement to pay the plaintiff effectually precludes him. When notified of the assignment, if he had stated his counterclaims and promised to pay only such balance as might be due, his debt would have been protected; or, if he had not promised at all, the action must have been brought by Fisher, and he would have had a right to set-off, according to the statute, if legally and equitably entitled. But his promise to pay, especially after signify-

ing a wish to deduct what was due to him from Fisher, *amounts to a relinquishment of his right*, or an acknowledgment that he had none."

The opinion of CHANCELLOR WALWORTH, in *Bridge vs. Johnson* (5 Wend., 341) is a convincing statement of the law on this point in a case very similar to the present. The authorities on the subject are reviewed, and the effect of such a promise as a legal waiver of a right of set-off is sustained on undoubted propositions of law.

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JOHN F. DILLON,
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March 31, '86.—50.

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OCTOBER TERM, 1885.

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FACTS.

This was an action upon a promissory note, made by the defendant, for the sum of five thousand dollars, payable to the order of H. B. Wilbur, treasurer of defendant, on demand, after date, with interest; and by said Wilbur, as such treasurer, endorsed in blank. It was dated "Boston, July 10th, 1873." The case was tried before referee. *Vide* Report Record, p. 7.

In 1872, the Vermont Central and Vermont & Canada Railroads were in the possession of Receivers, under the appointment of the Court of Chancery for Vermont. The defendant was chartered that year with power temporarily to operate such roads, subject to the order of said court, and to assume the contracts of said receivers. Subscriptions to the capital stock of the defendant, to the amount of $2,000,000 were subscribed April 30, 1873, of which John Q. Hoyt, of the City of New York, subscribed $50,000. Five per cent. of the subscriptions were required by the commissioners of the subscriptions to be paid down. "The receivers were in need of funds, and by "arrangement with them, one of the subscribers ad- "vanced $200,000, ten per cent. of the subscription, in "behalf of all the subscribers, as a temporary loan to the "receivers, pending the organization of the company "and proceedings to carry out the expectations of the "subscribers; and a note of that amount was made, and "with $400,000 in amount of the income and extension "bonds as collateral security for its payment, delivered "to the subscribers making the advance, upon the un- "derstanding that the note should be paid, if the defend- "ant company did not come into possession of the road "and assume the obligations of the receivers, *and stand* "*against the subscriptions for stock, if it did.*" Record, folio 19, p. 9.

The defendant company was organized May 27th, 1873, duly appointed receivers of said roads June 21st, 1873, and went into possession of the same, assuming the obligations of the former receivers, July ~~17th~~ 1st, 1873. An

assessment of thirty per cent. on the stock was laid June 24th; ten per cent., August 13th; ten per cent., October 28th.

"After the arrangement for making the defendant "receiver of the roads was consummated, the note of "$200,000 was given up, and new notes of the defendant "were given, running to the subscribers separately, each "in proportion to the amount of his subscription. * * * "Hoyt paid $5,000 and received the note in suit and "$10,000 of the bonds. Hoyt paid the assessments of "June 24th, August 13th and one-half of the asessment of "Oct. 28th, the other half of the latter was rescinded, and "stock issued for one-half of the amount subscribed. The "assessments paid amounted to fifty per cent. of the subs- "criptions. Hoyt paid, as was stated, fifty per cent. of "his subscription and no more. There was no other "consideration for this note, and by the understanding of "the parties, it was to be delivered up with the collateral "bonds on delivery to him of stock certificates for his "stock." *Vide* Record, Referee's report, folios 20 and 21, p. 8.

The amount of this note was included in the fifty per cent. so paid by Hoyt. November 1st, 1873, Hoyt passed this note and said bonds to the plaintiff, as collateral security for the payment of a loan, then made of the plaintiff.

POINTS.

I.

(a). This note, having been transferred three months and twenty-one days after its date, was *overdue*, and subject to every defense existing against it before it was negotiated.

Judge Wheeler says, in the opinion of the court (Record, folio 23, p. 13), "no case shows that more than three months can reasonably be overlooked" in determining when business paper of this sort becomes due.

In Camp vs. Clark, (14 Vt., 387) the note was payable on demand with interest, and was transferred two months after date. The court, Redfield, Judge, held that it was overdue and dishonored. The same court in a later case, Morey vs. Wakefield, (41 Vt., 24) affirms the rule of Camp vs. Clark.

In Losee vs. Dunkin, (7 Johnson, 70) note was on demand and interest. It was negotiated two and one-half months after its date, and, in a suit by the holder, the maker was allowed to show payment to the original payee. No particular circumstances were disclosed. The rule in this case was endorsed by the court in Cise vs. Cunningham, 1 Cowen, p. 379.

In Herrick vs. Wolverton, (41 N. Y., 2 Hand, p. 581), this subject is very fully discussed, and the authorities very carefully reviewed. The action was on a promissory note of $1500 on demand, with interest, which was transferred two months and thirteen days after its date. The note was given as security for the return of fifty shares of stock loaned by one J. R. Herrick, to the defendant. It was made payable to H. D. Hawkins, and immediately endorsed and delivered to said J. R. Herrick, who thereby became the *original holder or endorsee*. The court, Foster, J., says (p. 588): "I think that it is not correct to "say that such notes are intended for circulation from "hand to hand as commercial paper. It is true that "they do so circulate to some extent, but, generally, the "notes which are issued and used for circulation are pay-"able at a day certain, and in regard to which all the "parties know when and how the liabilities of the endors-"ers are to be fixed or discharged."

"There is no good reason why such notes should cir-"culate as commercial paper any more than that paper "payable at a time certain and which is past due, should "perform that office, for both alike must be paid whenever "the holder requires it. And why should either kind be "circulated? The obligation of the maker of either has "matured, or, at farthest, matures on demand, which in "both cases may be made at once, and if the holder "wants to raise money on them, why not apply for

"payment and receive it from the party from whom it "was due, instead of selling it to some one else who "may the next moment make such demand? The very "fact that the holder of such paper offers it for sale or "circulation seems to imply that there is some reason "not apparent why he does not demand its payment of "the maker. And surely no one can doubt that such "paper is legally payable immediately after it is issued, "if the holder demands it."

Again (p. 590), "In this country the law is that a "promissory note, payable on demand, unless demanded "within a reasonable time, is considered overdue and "dishonored * * * and the rule is the same if pay- "able with interest, * * * and, as in this State, no "absolute measure of this reasonable time has been fixed. "* * A day or two, * * seven days * and "even a month * is not too long. While eight "months, * three months and one-half, * and even "two and one-half * have been deemed sufficient to "discredit a note."

Again (p. 598), Grover, Judge, says: "When the holder "offers to transfer the note, it is certain that he does "not wish to retain it longer, but to realize the amount "thereof. Then, why not demand the payment at once "of the maker is an inquiry naturally suggested to the "mind of any person to whom it is offered."

The court held the note past due and, therefore, dishonored.

Judge Wheeler, in the present case, (p. 13) says: "The circumstance that the holder of the note was bor- "rowing on disadvantageous terms, would lead directly "to the inquiry why he did not resort to the maker when "it was due on demand. Had the plaintiff inquired, the "presumption is that he would have learned the truth and "both would have been saved from loss." These circumstances would lead the court to limit rather than enlarge the rule.

(b.) This note, it should be remarked, was executed in Boston, and payable generally. The subject is, and was regulated by statute both in Massachusetts and Vermont, by which a note, payable on demand, is declared to be overdue sixty days after its date.

General Laws of Mass., p.—
Revised Laws of Vt., Sec. 2013.

(c.) What is a reasonable time, when the facts are ascertained, is a question of law.

Tindall vs. Brown, 1 Term. Reports, 167.
Camp vs. Clark, *Supra.*

II.

(a) As against Hoyt, the facts of this case constitute a complete bar. The note was "to stand against Hoyt's subscription for the stock."

Referee's Report, Record, p 7 and 8.

Assessments on Hoyt's subscription for the stock, more than enough to cover the note, were made against him, even before its transfer to the plaintiff. The assessment, in fact, paid the note. That was the understanding.

As between Hoyt and defendant, the note had the force simply of a receipt of money from Hoyt to satisfy his subscription and to be applied as payment thereon, when an assessment should be made. "This evidence did not "vary the note or its obligation. It recognized the note "as a valid instrument according to its terms, but showed "an obligation from the holder to an equal amount to be "set off against the note." *Opinion of Judge Wheeler, vide.*

The evidence was not offered or considered upon the question as to how the note was to be interpreted or construed, but simply upon the question as to how it was to be paid and satisfied; and whether the agreement to satisfy was enforceable or not while unexecuted, yet, after it was performed, it operated to discharge the note.

Follett & Bradley vs. Eastman, 16 Vt., p. 19.
Gilson vs. Gilson, 16 Vt., p. 464.

And, in such a case, the defendant is entitled to make any defense which grew out of the note transaction, or out of any agreement between himself and payee in relation to it.

Walbridge vs. Kibbee, 20 Vt., p. 445.
Pecker vs. Sawyer, 24 Vt., 459.

(b) The fact that the note was to be delivered up by Hoyt on stock certificates for his stock gives no aid to the plaintiff, because, as is well stated by the court below, "the person who took the note was not a purchaser of "stock but a subscriber for stock. The assessments made "the debt due from him, and it was that debt which met "the note. He could not resist payment of assessments "because the stock certificates were not delivered. "The delivery of the certificates did not pay the note, "nor create the debt which would pay it. That was "merely the occasion when the note was to be delivered "up."

American Bank vs. Jenness, 2 Metcalf, 288.

(c) But, it is suggested that if the delivery of the stock certificates was even a necessary element in the payment of the note, that such delivery to Hoyt was made in 1874, when the defendant supposed Hoyt to

hold the note, and upon Hoyt's promise to procure the same and deliver it to the defendant. Record, folio 23, p. 9.

This was two years before the defendant had notice that the plaintiff held the note. Record, folio 24, p. 9.

In that case even, the defendant has a perfect answer.

III.

The plaintiff's claim, that, at an interview between himself and the president of the defendant, the latter stated that if Hoyt did not pay the note, the defendant would provide for it (Record, p. 9) was too vague to have any force as an agreement, was without any new consideration, was not shown to be authorized, and the plaintiff lost nothing by reason of it, having the same rights against his debtor *after as before*.

No authorities need be cited to this proposition.

IV.

This note being collateral security for a debt, owed by Hoyt to the plaintiff, and the latter having received usurious interest thereon from Hoyt, the debt was thereby avoided, and ceased to be a legal claim.

The pretension of the plaintiff that such extra interest was understood by him to be compensation for service was frivolous, considering the character, uniformity and frequency of the payments. The statement of Hoyt that the payments were made for the use of the money and nothing else, and the fact found by the referee that nothing was shown to be otherwise due from Hoyt to the plaintiff, (Record, pages 8 and 9, folios 22 and 23) are conclusive of the corrupt and usurious character of the transaction and avoid his debt.